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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 60

REVEREND E. S. EVANS, et al.,
Petitioners,

v.

GUYTON G. ABNEY, et al.,
Respondents.

BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia.

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BRIEF

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Georgia.

QUESTION PRESENTED

Where a testator devises land in trust with the direction that said land be used as a park for the white persons,[1] and only for the white persons, of the community, and states as the reason for the racial limitation his positive disapproval of the two races using recreation grounds

[1] The property was devised in trust "for the sole . . . use of the white women, white girls, white boys, and white children of the City of Macon . . ." The Board of Managers in which management of the park was vested was given the authority to admit "the white men of the City of Macon and white persons of other communities."

together and in common, and where it is subsequently held by the United States Supreme Court that the property cannot continue to be used as a park for white persons only, are Negro citizens of the community denied any Federal constitutional rights by a judgment of a state court recognizing that (as a matter of state law and of the interpretation of the particular will under consideration) the trust has failed, and the property has reverted to the heirs of the testator?

STATEMENT OF THE CASE

Respondents incorporate by reference the statement of the case contained in the opinion of the Supreme Court of Georgia, which opinion is included in the appendix to the Petition for Writ of Certiorari (Petition, P. 16a et seq.). Generally speaking, and except as hereinafter commented upon, petitioners have made a relatively accurate summary of most of the evidence which is in the record. However, as far as the issues are concerned, we view the great bulk of material in the record as being largely, if not entirely, irrelevant. This is so because the disposition of this case in the Georgia courts was controlled by the clear and unambiguous terms of the will of A. O. Bacon interpreted in the light of well-settled principles of Georgia law.

Petitioners state at page 5 of their petition that the Baconsfield property was "left to the City of Macon". Since petitioners have, throughout this litigation, tended to overemphasize and exaggerate the role of the City, it should be noted that the property was not devised to the City of Macon outright, but instead the City's interest in the property was as the passive title holder, and the use of the property was subject to certain specific conditions (as well as the continuing control of the Board of Managers).

Petitioners are in error when they state on page 7 that the motion of respondents in Bibb Superior Court asked that court to "rule that Senator Bacon's trust had become unenforceable, and that the Baconsfield property had reverted . . .". That the trust had become unenforceable had already been recognized by the Georgia Supreme Court and respondents' motion for summary judgment took note of this:

> "On January 17, 1966, Bacon's trust became unenforceable and the funds held for its support re-

verted at that time into Bacon's estate by operation of law. On March 14, 1966, the Georgia Supreme Court recognized that this had occurred, saying, 'We are of the opinion that the sole purpose for which this trust was created has been terminated.' This judgment declaring what had transpired in regard to the title is now the law of the case. It remains only for this court at this time to give effect to said reversion of title." Respondents' Motion for Summary Judgment, paragraph 2 (R. 127).[2]

The "secondary contentions" which the Georgia Supreme Court directed Bibb Superior Court to consider, were those contentions resulting from the decision that the Baconsfield property could not be used in accordance with the provisions of Bacon's will, that the trust had failed and the property had reverted into Bacon's estate. The Georgia Supreme Court having ruled that the trust had failed and the property had reverted, the only real question before Bibb Superior Court involved a determination as to the individuals in whom title had vested by operation of law.

The Will

In view of the fundamental importance of Bacon's will, those passages from Items IX and X which are controlling are quoted herewith:

". . . it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions of every estate in the

[2] Page references are to the record in the Georgia Supreme Court, as respondents do not have access to the record in the United States Supreme Court. The record in the United States Supreme Court is (for the most part) a photostatic copy of the record in the state court, and therefore the court will have before it the state court record's page numbers.

same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for **the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon** to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for; the said property **under no circumstances**, or by any authority whatsoever, to be sold or alienated or disposed of, **or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.** For the control, management, preservation and improvement of said property there shall be a Board of Managers consisting of seven persons of whom not less than four shall be white women, and all seven of whom shall be white persons. The Members of this Board shall first be selected and appointed by the Mayor and Council of the City of Macon, or by their successors in said trust; and all vacancies in said Board shall be filled by appointments made by the Mayor and Council of the City of Macon, or their successors, upon nomination made by the said Board of Managers and approved by the said Mayor and Council of the City of Macon or their successors. If practicable, I desire that there shall be as a member of said Board of Managers at least one male or female descendant of my own blood, not only in the Board as at first constituted, but at all times thereafter. **The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same, and rules for the use and enjoyment thereof, with power to**

exclude at any time any person or persons of either sex, who may be deemed objectionable, or whose conduct or character may by said Board be adjudged or considered objectionable, or such as to render for any reason in the judgment of said Board their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same for the purposes herein contemplated. The Board of Managers shall have the power to admit to the use of the property white men of the City of Macon, and white persons of other communities, with the right reserved to at any time withhold or withdraw such privilege in their discretion. To enable the Board of Managers to have a fund for the payment of necessary expenses connected with the management, improvement, and preservation of said property, including when possible drives and walks, casinos and parlors for women, play grounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements, I direct that said Board may use for purposes of income in any manner they may deem best that portion of the property that lies Easterly of the road known as Boulevard Baconsfield (more particular description of property omitted), but in no event and under no circumstances shall any part of the property herein conveyed and bounded and platted be ever sold or otherwise alienated or practically disposed of by any person or authority whatsoever, and excepting the portions of the property which may be used for purposes of revenue as aforesaid all the remainder of said property shall forever and in perpetuity be held for the sole uses, benefits and enjoyments as herein directed and specified . . ."

". . . **I take occasion to say that in limiting the use and enjoyment of the property perpetually to**

white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I AM HOWEVER, WITHOUT HESITATION IN THE OPINION THAT IN THEIR SOCIAL RELATIONS THE TWO RACES SHOULD BE FOREVER SEPARATE AND THAT THEY SHOULD NOT HAVE PLEASURE OR RECREATION GROUNDS TO BE USED OR ENJOYED, TOGETHER AND IN COMMON. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white persons herein specified by my gratitude to and love for the people of the City of Macon from whom through a long life time I have received so much of personal kindness and so much of public honor; and especially as a memorial to my ever lamented and only sons, Lamar Bacon who died on the 21st day of December, 1884, and Augustus Octavius Bacon, Jr., who died on the 27th day of the same year. **And I conjure all of my descendants to the remotest generation as they shall honor my memory and respect my wishes to see to it that this property is cared for, protected and preserved forever for the uses and purposes herein indicated . . .**"

". . . If for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under the Charter of the City to hold said fund in trust for the purposes specified, then unless said power is obtained through appropriate legislation, I direct that the powers herein expressed be conferred upon a trustee to be selected by the Mayor and Council of the City of Macon, with such safeguards and restrictions as may be prescribed by them for the perpetual safekeeping

and management of the fund. And I give a similar direction if for any reason it should be held that the Mayor and Council of the City of Macon have not the legal power under their Charter to hold in trust for the purposes specified the property designated for said park and pleasure ground, unless said required power is conferred by appropriate legislation . . ."

". . . As there will be no one of my descendants who now bears my name either by right of birth, or through voluntary choice, an additional reason is furnished why I should deem it proper that in devoting this property to the uses specified, **I should at the same time link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community** of which they once formed a happy part . . ." (R. 14-21) (emphasis supplied).

The 1920 Deed

The statement on page 13 that "the City of Macon thus paid a total of $41,625.00 to the trustees under Bacon's will in order to acquire Baconsfield" is inaccurate. The City of Macon's limited interest in the Baconsfield property was acquired by virtue of the provisions of Bacon's will, and not because of the 1920 deed. Under the terms of Bacon's will, the park was not to come into being until the deaths of Bacon's wife and two children. However, the trustees and Bacon's sole surviving daughter were apparently of the opinion that it would be desirable to proceed with an earlier development of Baconsfield than anticipated by Bacon's will. Therefore, the trustees advised the City of Macon that they would permit the City to take possession of Baconsfield prior to the death of Bacon's surviving daughter provided the City would agree to pay an annual rental during her lifetime (R. 689). Thus the sole purpose of the deed of February 4, 1920 was to permit

the development of Baconsfield as a park prior to the death of Bacon's surviving daughter (who had a beneficial life estate in the property).

City Activity

On page 14, petitioners state that the Superintendent of Parks of the City of Macon "exercised general supervision over Baconsfield for many years." This is not true. Baconsfield was "supervised" and operated by the Board of Managers which Bacon provided for in his will:

> "The said Board of Managers shall at all times have complete and unrestricted control and management of the said property, with power to make all needful regulations for the preservation and improvement of the same . . ." (R. 17).

The Board of Managers of Baconsfield functioned entirely independent of the City and it always exercised to the fullest those powers granted under Bacon's will. In none of its duties was the Board made answerable to the City; nor did the City, as Trustee, have the right to remove any member of the Board.

That the Board, and not the City, operated the park is evidenced by the minutes of the Board of Managers from 1936 to 1964. (See Intervenors' Exhibits "A" and "B", R. 361 et seq.) These minutes which take up approximately 150 pages and summarize action taken at some 53 separate meetings during the period covered show that the Board of Managers dealt with the minutest details of the operation of the park. Furthermore, a financial statement is attached to the minutes of each meeting and a rough calculation shows that a total of some $95,000.00 was spent by the Board in the operation of the park. (These funds were derived from Bacon's commercial properties.)

Petitioners seem to try to create the impression that governmental units have constructed numerous physical

improvements on the park area. That this is not so is illustrated by the aerial photographs included in the record (R. 646-657). From these it may be seen that Baconsfield is largely a matter of trees, shrubbery and grass, with only one real structure upon it, to-wit, the Woman's Clubhouse (which itself comprises a very small portion of the park area).

Petitioners have greatly overemphasized the role of the City in the development of Baconsfield, especially when they attempt to convey the idea that City funds have been used to greatly enhance the value of the property. The activities of the City in assisting in the upkeep of the park, while beneficial, did little to increase the intrinsic value of the land. Also, it should be remembered that during this period of time a substantial number of taxpayers were entitled to use the park.

The pool which was constructed in 1948 was operated by the City pursuant to the terms of a lease agreement with the Board of Managers as lessor. Under the terms of the agreement, the Board could terminate the lease at will at two-year intervals, or by giving notice of a breach of any one of a number of stated conditions (See copy of lease attached to Amendment to Motion for Summary Judgment as Exhibit "D", R. 660). The relationship between the City of Macon and the Board of Managers was that of lessor and lessee. A fundamental element of such a relationship is that when the lease expires, or is terminated, any improvements that might have been made to the land will remain as a part of the land, and the lessee has no further rights or interest in either the land or the improvements.

We see no particular need to comment further on the statement of facts, except, perhaps to note once again that petitioners' "history" of Baconsfield Park had no bearing on the issues before the Georgia court.

REASONS FOR NOT GRANTING THE WRIT

Summary of Argument

The decision of the Georgia Supreme Court involved nothing more than the construction of a Georgia will in accordance with well-settled principles of Georgia law, and no rights guaranteed petitioners by the Fourteenth Amendment, or any other provision of the Federal Constitution, have been denied.

When A. O. Bacon devised his farm, "Baconsfield", to the City of Macon, in trust, he clearly provided that his property was to be used as a park **only** for the "white women . . . and white children of the City of Macon . . ."[3] In limiting the use of the property to white persons, Bacon was not motivated by any feeling of hostility toward colored persons, nor was he prompted by a desire to be charitable only to persons of his own race. Instead, it was that as a matter of personal social philosophy Bacon was of the firm conviction that, "the two races should be forever separate and . . . should not have pleasure of recreation grounds to be used or enjoyed, together and in common."

Some fifty years after the probate of Bacon's will, this Court, in **Evans v. Newton**, 382 U. S. 296 (1966) ruled that Bacon's property could no longer continue to be used as a park for white persons only. Upon remand of the case to the Georgia Supreme Court, it then became the duty of that court to consider, and construe, Bacon's will in the light of the decision of this Court.

The Georgia court had before it two basic "facts", *viz.* (1) Bacon's clear expression of intention that he wanted his property used as a park only for white per-

[3] See Footnote 1.

sons, and that he was opposed to his property being used as a park on an integrated basis and, (2) this Court's ruling that the property could not continue to be used as a park if it were not operated on an integrated basis. The purpose for which the trust had been established (to wit, a park for the **sole** use of the "white women . . . and white children of the City of Macon . . .") had obviously become impossible of accomplishment. Furthermore, that the use of Bacon's property for an integrated park would be directly contrary to Bacon's clearly expressed intention was a **fact** which the Georgia court had to accept. And it was a fact totally apart from the wisdom of Bacon's social philosophy; for the Georgia court was constrained to consider, not what it might want, but rather only what Bacon would have wanted. Under Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori,* it cannot be devoted to a use of which the testator has expressly stated he disapproves. Thus, as a matter of basic Georgia law, the court had to recognize that the purpose for which the trust had been established had become impossible of accomplishment, that the trust had failed, and that the property had reverted into Bacon's estate by operation of law.

In construing Bacon's will, it was incumbent upon the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of Bacon's property to white persons. Contrary to the contention of petitioners, under no theory could the court have considered any provision of the will as being a "nullity". If a charitable trust fails because an indispensable provision of the trust is deemed to be unenforceable, the result is not an ipso facto elimination of that provision from the will, but instead it then becomes the duty of the court to decide

whether under the circumstances then existing *cy pres* should, or should not, be applied. Under no circumstances can the testator's intention simply be disregarded or ignored.

The Georgia court was correct in not applying *cy pres*, for this is an intent-enforcing doctrine and it can be applied only for the purpose of carrying out what probably would have been in accordance with the intention of the testator. It can never be applied where the result would be contrary to the express desire of the testator, and it cannot be denied that for Bacon's property to be used as a park open to both races would be directly contrary to his wishes.

Contrary to the contention of petitioners, the Georgia court was not concerned with whether Negroes might spoil the use of the park for white persons, or whether, as a matter of fact white persons would "enjoy" using the property as a park on an integrated basis. The court's only concern was whether such use would violate Bacon's restriction that the property be used by white persons only, and clearly it would.

No Federal rights have been denied petitioners, as the "Federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This the Georgia Court recognized and accepted. There was no Federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by the will, and would be contrary to the laws of Georgia.

Any possible question of racial discrimination, or of impermissible state action, was eliminated by this Court's decision in **Evans v. Newton,** supra, for with the failure

of the trust, and the reversion of the property into the estate of A. O. Bacon, the property has been removed from the "public" sphere. In the decision under consideration, there is no question of anyone being discriminated against because of race, nor is it conceivable that the decision could be considered as one which would encourage racial discrimination. On the contrary, the Georgia courts expressly recognized that Bacon's property cannot be used as a park on a racially discriminatory basis.

In summary, it is the position of respondents that this case involves the construction of a Georgia will by a Georgia court in accordance with Georgia law, and nothing else, and in no way have any rights guaranteed petitioners by the Federal Constitution been denied.

ARGUMENT

The State Court Decision

Respondents submit that the petition for a writ of certiorari should be denied because the decision of the Supreme Court of Georgia involved nothing more than the application of well-settled principles of Georgia law to a Georgia will. No rights guaranteed petitioners by the Fourteenth Amendment have been denied; nor is the decision of the Georgia court in any way inconsistent with the decision of this court in **Evans v. Newton,** 382 U. S. 296 (1966).

This Court has scrupulously adhered to the rule that the highest court of a state may administer its statutory and common law according to its own understanding and interpretation (see, e. g., **American Railway Express Co. v. Commonwealth of Kentucky,** 273 U. S. 269 (1927)), and especially where the law which is being administered by the state tribunal is property law (see **Tyler v. U. S.,** 281 U. S. 497 (1930)), or where the case involves the construction of a will. As this Court stated in **Lyeth v. Hoey,** 305 U. S. 180, 59 S. Ct. 155 (1938):

> "The local law determines the right to make a testamentary disposition . . . and the condition essential to the validity of wills, and **the state courts settle their construction.**" 59 S. Ct. at 158. (Emphasis supplied.)

The Decision of the Georgia Court Does Not "Frustrate This Court's Mandate in Evans v. Newton, 382 U. S. 296 (1966)"

The thrust of this Court's decision in **Evans v. Newton,** supra, as we understand it, was only that if Baconsfield continued in existence as a park, it would have to be open to members of both races. Contrary to the contention of

petitioners, we do not construe the decision of this Court as including a direction to the Georgia Supreme Court to reappoint the City of Macon as trustee. Instead, it was the duty of the Georgia Supreme Court to consider the entire case (and not just the limited question relating to the resignation of the City as trustee and the appointment of new trustees) in the light of the decision of this Court that Bacon's property could not be used as a park for white persons only.

While it is true that the order appointing new trustees had been reversed, and the "trust" was without a trustee, the controlling consideration was the fact that a common sense construction of Bacon's will in the light of the decision of this Court led the Georgia Supreme Court to the inescapable conclusion that the purpose for which the trust had been created had become impossible of accomplishment; and, consequently, under Georgia law, the trust had terminated. Furthermore, under Georgia law, where a trust fails, and where there is no gift over, a resulting trust is implied for the benefit of the heirs of the testator. Ga. Code, Sec. 108-106 (4). The question, therefore, of whether or not to order the reinstatement of the City of Macon as trustee was obviously moot, for there was no longer a trust.

The Decree of the Court Below Is Not Hostile to the Petitioners' Right to Immunity From Racial Discrimination

A. **The Decision of the Georgia Supreme Court Did Not Infringe Upon Any Rights Guaranteed Petitioners by the Fourteenth Amendment; Nor Does It Encourage Racial Discrimination. The Decision Involved Nothing More Than the Construction of a Georgia Will by a Georgia Court in Accordance With Georgia Law.**

The "immediate contemporary facts" with which petitioners choose to begin their Fourteenth Amendment ar-

gument are not the "facts" with which the Georgia court was directly concerned. On the contrary, the Georgia court had only two basic "facts" to consider, one being this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), and the other, of course, being Bacon's will. The fact that Negroes had used the park in violation of the terms of the trust, and that the City had not taken affirmative action to enforce the racial provisions in the trust, had nothing directly to do with the decision of the Georgia court which is herein complained of. These were matters which had transpired prior to this Court's decision in **Evans v. Newton**, supra. The "showing", then, upon which the Georgia court acted was this Court's ruling that Bacon's property could not be used as a park on other than an integrated basis, something which would be contrary to Bacon's express wishes; and the basis of the Georgia decision was a construction of Bacon's will in the light of this ruling, and in the framework of Georgia's laws relative to wills and trusts.

The "federal interest" of petitioners is no more than that if Baconsfield were continued in existence as a park, it would have to be operated on a non-discriminatory basis. This, of course, the Georgia court recognized and accepted. There is no basis for the implication that there was an additional federal requirement that the Georgia court construe Bacon's will in such a manner that would result in Baconsfield continuing as a park, when such construction would not be authorized by Bacon's will, and would be contrary to the laws of Georgia. The construction of Bacon's will was peculiarly a matter which addressed itself to the state court. See, **e. g., Lyeth v. Hoey**, 305 U. S. 180, 59 S. Ct. 155 (1938). And as Mr. Justice Black observed in his dissenting opinion in **Evans v. Newton**:

> "So far as I have been able to find, the power of a state to decide such a question (reversion) has been

taken for granted in every prior opinion this Court has ever written touching the subject." Evans v. Newton, 382 U. S. 296 (1966).

Petitioners' characterization of the Georgia judgment as being a "penalty" which was imposed upon the City of Macon because of its inability to enforce racial segregation at Baconsfield does not comport with the facts. Petitioners are trying to find impermissible state action where none exists. In so doing, they paint a totally false picture; one which is clearly refuted by the record. Reversion occurred **only** because the trust failed, and the trust failed, not because the City did not undertake to enforce the racial restriction, but because this Court had ruled that an indispensable element of Bacon's plan for Baconsfield could not be complied with, regardless of who the trustee was. The Georgia Supreme Court did not look to the will to "justify" its judgment. It looked to the will to determine what its judgment had to be.

Accurately speaking, the actual decision of the Georgia court had nothing whatever to do with racial discrimination as such. This issue had been completely eliminated by the decision in **Evans v. Newton**, 382 U. S. 296 (1966). The decision of the Georgia court was based upon a set of **facts** which can, and must, be divorced from any consideration of the merits of Bacon's social philosophy. The Georgia court had to start with the fundamental proposition that in construing Bacon's will all parts and provisions of the will had to be considered. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942). The wisdom of these provisions was not in issue. Thus, the Georgia court had before it on the one hand Bacon's clear expression of intention that he wanted a park **only** for "white women, white children . . .", and that he was unequivocally opposed to the two races using recreation grounds "together and in common". On the other hand, this court had ruled that Bacon's property could not be used

as a park unless it was open to members of both races. Certainly, it cannot be denied that for the property to be used as a park open to members of both races would be directly contrary to the clearly expressed intention of Bacon. That was a fact which the Georgia Court had to accept. As a matter of Georgia law, property devised in trust for a charitable use cannot be diverted from that use to one not intended or authorized by the testator, and *a fortiori,* it cannot be devoted to a use of which the testator has expressly stated he disapproves. Therefore, accepting the foregoing as facts which the Georgia court could not blithely ignore (even if perhaps the members of the court might personally have disagreed with Bacon's social philosophy), the court had no alternative but to recognize that as a matter of Georgia law the trust had failed.[4] We say, without hesitation, that race had nothing to do with the decision of the Georgia Court.

We disagree with the assertion that the Georgia decision will be cited for "the proposition that state courts may generally decree reversion of property for breach of a racial condition." Petitioners overlook the fact that this case does not involve property which had been purchased subject to a racial condition. This was Bacon's property and it is fundamental that a person who creates a charitable trust can make the use of his property subject to conditions.[5] That is not to say that a testator

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[4] For the Georgia Court to have failed to recognize that the trust had failed would have resulted in a deprivation of respondents' property without due process of law. See **Charlotte Park & Recreation Commission v. Barringer,** 252 N. E. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956).

[5] As Justice Harlan noted in his concurring opinion in **Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church**: "I do not, however read the Court's opinion to go further to hold that the Fourteenth Amendment forbids civilian courts from enforcing a deed or will which expressly and clearly lays down conditions limiting

could require that his property be used in a manner contrary to law, but it does mean that under no circumstances could the property be used in a manner violative of the express conditions imposed upon the use of the testator's property. It is one thing for a court to say, in effect, that as a matter of public policy we are not going to let a testator's property be used in the manner he would like it to be, and indeed, quite another to go further and say that since the property cannot be used in the prescribed manner, it will be put to another use even though the testator specifically stated that he disapproved of such use.

Contrary to the contention of petitioners (Petition, pp. 33 and 36), the decision of the Georgia court is not at all inconsonant with **Reitman v. Mulkey**, 387 U. S. 369 (1967) (or with any other decision of this court). In **Reitman**, supra, it was found that the state had involved itself in private racial discrimination to an unconstitutional degree. There, and in the other cases cited at page 33 of the petition which relate to racial discrimination, the courts were concerned with state involvement in actual racial discrimination, both present and prospective. In the decision under consideration, there is no question of anyone being discriminated against because of race; and, certainly there is nothing which would remotely suggest that the state has encouraged, or been in any way involved with constitutionally impermissible racial discrimination. It was Bacon, not the State of Georgia, who decreed that his property would not be used as an integrated park, and no one has any **right**, federal or otherwise, to require that the property be used in a manner contrary to the re-

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a religious organization's use of the property which is granted. If, for example, the donor expressly gives his Church some money on the condition that the Church never ordain a woman as a minister or elder . . ., or never amend certain specified articles of the Confession of Faith, he is entitled to the money back if the condition is not fulfilled." 37 Law Week 4107, 4110 (January 27, 1969).

strictions placed upon the use of the property by Bacon. And, of course, with the removal of the property from the "public" to the private sphere any possible question of state action which would violate the Fourteenth Amendment has been eliminated. It is indeed difficult to conceive how the Georgia decision, which expressly recognized that Bacon's property could not continue to be used as a segregated park, could in any way "encourage racial discrimination."

Although the construction of wills is peculiarly a matter for the application of state law by state courts, petitioners urge upon this Court the contention that the Georgia court incorrectly construed Bacon's will. Looking at the will in even a cursory manner, one cannot help but be impressed by the fact that Bacon planned for his park with the greatest of care and deliberation. This park, which was to be a memorial to Bacon's two sons, was by no means to be just another "city park." Instead, Bacon's park was to be subject to conditions not applicable to other parks; and the operation and management of the park were vested in a Board of Managers which was to (and did) function entirely independent of the City and its governing body.

As for the racial restriction, we can hardly imagine Bacon having used language which would have more clearly indicated his intent that the use of his property should be extended to white persons only, or which would have more clearly indicated that this limitation was an essential and indispensable part of his plan for Baconsfield. Indicative of Bacon's careful planning in this regard is the fact that not only was he careful to limit Baconsfield to white persons, but also he provided that the white men of Macon, and white persons from other communities, would be admitted only at the pleasure of the Board of Managers. Furthermore, he authorized the Board to "exclude at any time any person or persons of either sex, who may be deemed objectionable."

Insofar as this litigation is concerned, obviously, the most significant passage in Bacon's will is that which explains why he so carefully limited the use of Baconsfield to the "white women, white girls, white boys, and white children of the City of Macon." The racial limitation was not included because of any feeling of hostility toward colored people, nor was it prompted by a desire to be charitable only to persons of his own race, or because Bacon felt that the presence of Negroes would "spoil" the park for white persons. Instead, it was that as a matter of personal social philosophy, Bacon was:

> ". . . without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common" (R. 18).

Petitioners have suggested several reasons why they think the Georgia court erred in its construction of Bacon's will, none of which, we submit, has any merit.

First, they argue that neither Bacon nor any other person "has any lawful power" to exclude Negroes from Baconsfield park. As has been pointed out, there is no dispute about the fact that Bacon's property cannot now be used for a park operated on a segregated basis. However, at the time Bacon's will was probated, and up until this Court's decision in 1966, there was no constitutional prohibition against the operation of Baconsfield in a manner consistent with the requirements set forth in Bacon's will. The fact that some 50 years after the probate of Bacon's will it was decided by the United States Supreme Court that the park which Bacon created cannot continue to be operated for white persons only did not give the Georgia court, or any court, the right to rewrite Bacon's will and to delete those restrictions relative to the use of the park by white persons. There is clearly a difference

between a court determining that a trust cannot continue to be operated in accordance with the testator's intent because such operation would be contrary to law, and a holding that because of this, the "illegal" words will simply be disregarded. In such a situation as existed in this case, a court would in any event have to construe the will under consideration in light of the failure of the trust, and would have to determine whether or not *cy pres* could be applied, and if it could not, then the property would revert by operation of law. In no event could the testator's intention simply be disregarded or ignored.

The second consideration advanced by petitioners relates to the fact that Bacon did not expressly provide for reverter upon failure of the trust. It is probable that Bacon never actually considered that his trust would fail, for at the time he drafted his will (and up until 1966) his plan for Baconsfield was entirely lawful. The absence of a clause providing for express reversion is of no significance insofar as Georgia law is concerned. As the Georgia Supreme Court pointed out, the property reverted, not under the terms of the will, but because of Ga. Code Sec. 108-106 (4) which provides that upon the failure of an express trust, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

In not expressly providing for reversion, Bacon was not unlike other testators. As has been noted:

> "Indeed, it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter." IV **Scott, Trusts**, Sec. 399.2, at 2832 (2d ed. 1956).

We submit that a fair and reasonable reading of Bacon's will leads to the undeniable conclusion that under no cir-

cumstances could Bacon's property ever be used as an integrated park. While Bacon may not have specifically contemplated a trust failure, he **did** expressly state that he was "without hesitation in the opinion that in their social relations the two races should be **forever** separate and . . . they should not have pleasure or recreation grounds to be used or enjoyed together and in common." Bacon's will is certainly not "silent on this point."

Petitioners are in error when they suggest that the Georgia court should have considered what "a Georgian who died over 50 years ago" would prefer (Petition, p. 38). The Georgia court was constrained to consider only what **Bacon** (and no one else) would have wanted had he known that his plan for Baconsfield would someday become impossible of accomplishment; and, in answering this question, the Georgia court could look only to Bacon's will. That is to say, the court could not speculate as to what a hypothetical Georgian might have desired; nor could it engage in speculation as to what use might be made of the property upon reversion. There is no law, state or federal, which would permit a court to "update" a testator's social philosophy. Suffice it to say, the Georgia court was bound by Bacon's intention as manifested in **all** of the provisions of his will. See **Yerby v. Chandler**, 194 Ga. 263, 21 S. E. 2d 636 (1942).

Petitioners suggest that the activity of the City during the period it was trustee was relevant to the issues before the Georgia court. We disagree. The fact that during the period of years when the park was being operated by the Board of Managers in accordance with Bacon's will, workmen from the City worked at Baconsfield, or that the City had any other contact or connection with the park, had no bearing on the question of whether or not there had been a trust failure, and likewise had no bearing on the question of reversion, or the applicability of the doctrine of

cy pres. It would indeed be a radical introduction into the law of trusts for a court to hold that a trustee (or anyone else) could, in effect, alter the provisions of a testamentary charitable trust by spending money (or doing anything else) in connection with the trust property. Certainly, a trustee could never acquire title to the trust property in the absence of action on the part of the person who established the trust. This is true no matter how much money the trustee might spend on the trust property. In essence, the Georgia court was concerned solely with the question of whether or not the trust had failed and (upon recognizing that it had) whether or not cy pres should be applied. What might have happened between the time the trust became operative and the date of termination was of no relevance.

The case illustrative of the fact that the expenditure of funds by a municipality in connection with trust property would not prevent reversion is **Charlotte Park & Recreation Commission v. Barringer**, 252 N. E. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 (1956). In that case it was stated:

> "If Negroes use the Bonnie Brae Golf Course, the determinable fee . . . automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer." 88 S. E. 2d at 123.

Also, see 39 Am. Jur., Parks, Squares and Playgrounds, Sec. 21, where it is stated that where land is dedicated to a municipality as a park, it "must be preserved or the land will revert to the original proprietor."

While we do not view the activity of the City as having any bearing on the issues which were before the Georgia court, as a matter of interest, we would point out that there is nothing at all inequitable about the fact of

reversion, as during the period of time the City was trustee, a large segment of the community was entitled to use Baconsfield. The situation is not at all unlike that where a municipality leases property to be used as a park. Certainly, no one would suggest that the City could acquire any greater rights in the land than provided for in the contract with the owner.

B. **The Decision of the Georgia Court Rests Solely Upon a Construction of Bacon's Will, and in No Way Rests Upon Any Proposition That the Presence of Negroes Would Affect the Enjoyment of a Park by White Persons.**

The contention that the Georgia Supreme Court based its decision upon the ground that the presence of Negroes "spoils" a park for whites is totally without merit, or justification. The Georgia court was not in the least concerned with any factual consideration of whether or not the presence of Negroes might "frustrate" the enjoyment of a park by whites, nor was the court concerned with the question of whether or not the property was large enough to accommodate both the whites and Negroes of the community. Simply stated, petitioners miss the point when they talk solely in terms of "enjoyment". Whether or not white persons in the community might actually "enjoy" using Baconsfield in conjunction with Negroes, was **not** the question. Instead, the court's only concern was whether such use would violate Bacon's restriction that his property be used by white persons only. Clearly it would, for Bacon's concern was not that Negroes might adversely affect the enjoyment of the park by white persons, but rather it was that he was opposed to the mixing of the races in social relations. Stated differently, Bacon viewed an integrated park as being affirmatively objectionable, and regardless of the fact that many white persons might not object to using such a park, Bacon did not want his property so used.

Petitioners speak in terms of the "affirmative purpose of the trust" (Petition, p. 41), as if to imply that the Georgia court would have been justified in disregarding the racial restriction on the ground that such restriction was "negative". The Georgia court, of course, had to construe the will as a whole and to give consideration to all of its parts, including those which qualified the use of the property. Under a proper construction of Bacon's will, Bacon had only one intent, one purpose, to-wit, to create a park . . . "for the **sole** . . . use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon. . . ." His plan for a park for these persons was a comprehensive, cohesive, interlocking one which may not be divided into sections or parts.

In Bacon's mind, a park which would be used by both races was significantly different from a park which would be used only by members of one race, in that a park of the former type would be contrary to his personal social philosophy. While Bacon wanted to furnish a park for white persons in the community, his charitable intention was obviously conditioned upon the park being used by white only. Otherwise, his property would be put to a use which he considered wrong, to-wit, a recreation ground used jointly by members of both races.

Petitioners suggest that the Georgia court could have reached the result which petitioners deem to be socially desirable by applying the doctrine of *cy pres*. *Cy pres*, however, is not applied as a matter of course in every instance of charitable trust failure. It is an intent-enforcing doctrine and whether or not it can, or should, be applied depends upon a construction of the particular will under consideration. *Cy pres* can be applied "only for the purpose of carrying out what would probably have been in accordance with the intention of the testator."

IV **Scott, Trusts,** Sec. 399.1, at 2831 (2d ed. 1956). It can **never** be applied where the result would be contrary to the express desire of the testator. Ibid.

For a Georgia court (and surely this was a matter for the state court to decide) to have applied *cy pres* in the manner sought by petitioners, would have resulted in Bacon's property being put to a use of which he very clearly and expressly disapproved, and to apply *cy pres* in this manner would be contrary to Georgia law.

Actually, the result desired by petitioners (under any of their theories) could be obtained only by returning to our jurisprudence the rightfully rejected doctrine of the royal perogative. This doctrine, which was a part of the early English common law, permitted the sovereign in a situation such as this to apply property for any charitable purpose he might deem appropriate. According to Scott:

> "The exercise of the perogative power by a biased or cynical or whimsical king sometimes resulted in devoting the property of the testator to purposes of which he never would have approved, purposes which might run entirely counter to his wishes. . . ." IV **Scott, Trusts,** Sec. 399.1, at 2829 (2d ed. 1956).

This doctrine is not accepted in any of the states, and certainly not in Georgia. In **Jones v. Habersham,** 107 U. S. 174, it was stated, ". . . the law of charities is fully adopted in Georgia, as far as is compatible with a free government where no royal perogative is exercised . . ."

Scholars who wish to point out the obvious evils of the doctrine of the royal perogative cite as a classic case of injustice, **DeCosta v. DePas,** 1 Amb. 228, 2 Swanst 487 (1754). In that case, a Jewish testator had left money in trust to establish an assembly for reading Jewish law and instructing people in the Jewish religion. This was deemed to be illegal as promoting a religion contrary to the estab-

lished religion of the state. The king thereupon diverted the trust fund so that it would be used to instruct persons in the Christian religion.

Bacon's great emphasis on his racial limitation and his express disapproval of recreational areas which would be used by members of both races together and in common show that a "desegregated" park would indeed be as contrary to his wishes as the final disposition in **DeCosta v. DePas**, supra, would have been to the testator in that case.

Petitioners charge that the Georgia court "necessarily decided that the racial limitation in Senator Bacon's will was of more dignity and importance than his equally or more solemn and explicit provisions for the perpetuity of this trust" (Petition, p. 47). This is wrong. The racial limitation in the will was entitled to, and given, no more "dignity" than any other provision of Bacon's will; but it **was** entitled to consideration in its proper perspective, and this is something petitioners refuse to recognize. Giving the provisions relative to the racial restriction their common sense meaning, and construing the will as a whole, it can hardly be denied that *cy pres* could never be applied in such a manner that would result in Bacon's property being used as an integrated park. If there was any "policy decision" made by the Georgia court, it was only that the end does not justify the means, and thus *cy pres* was not used as an unauthorized means to rationalize a result not authorized by Bacon's will or Georgia law.

Petitioners do a serious injustice to the members of the Georgia Supreme Court when they charge that the judgment of that court "implies espousal . . . of an estimate that racial mixture is crucially undesirable" (Petition, p. 48). There is nothing in the record which would justify

anyone concluding that the members of the Georgia court shared Bacon's feelings on race. The merits (or demerits) of Bacon's philosophy were not in issue. The Georgia court had to accept what it found, and regardless of the personal opinions of the individual members of the Georgia court, the racial limitation which Bacon placed upon the use of his property could not be ignored.

In summary, whether or not the presence of Negroes spoils a park for whites was not in issue. Rather, the controlling consideration was Bacon's will and, notwithstanding the fact that whites might enjoy using a park in conjunction with Negroes, it is clear that an integrated park would be directly contrary to Bacon's intentions as expressed in his will.

C. The Racial Restrictions in Bacon's Will Could Not, Under Any Theory, Have Been Treated by the Georgia Court, or Any Other Court, as "Nullities". The Georgia Court, in Construing Bacon's Will, Had to Consider These Provisions Along With All Other Provisions of the Will.

Petitioners are indeed urging a radical departure from fundamental concepts of will-construction when they talk about treating any provision of a will as being a mere "nullity" which can be disregarded, as if it did not appear in the will. They are, in effect, saying that the Georgia court should have "rewritten" Bacon's will so that what they would consider to be a socially desirable result would have been obtained. This is simply not the law. As has been discussed, if a charitable trust fails because an indispensable provision thereof is deemed to be unenforceable, the result is not an *ipso facto* elimination of that provision from the will, but instead it then becomes the duty of the court to decide whether under the circumstances then existing *cy pres* should, or should not, be applied.

Petitioners offer as their first reason why Bacon's will should be accorded such unusual treatment the novel proposition that the provisions of Bacon's will relative to Baconsfield Park "became tantamount to City ordinances" (Petition, p. 50). Petitioners cite no authority in support of this unusual proposition, and, of course, there is none. A will does not lose its identity or status as a will simply because a municipality is named as the trustee of a testamentary trust.

Ordinances are commonly understood to be enactments of the legislative body of a municipal corporation. If a court accepted the proposition that the provisions of a will could somehow be considered to become city ordinances, then it would logically follow that the governing body of the city would have the power to alter the provisions of the will in the same manner they could amend "other city ordinances." We can hardly imagine a more fundamental (or more unacceptable) departure from the law of wills.

The "factual" reasons which petitioners cite in support of their argument that Bacon's will should be treated as a city ordinance are without merit. There is certainly no basis for the statement that the provisions of Bacon's will were "promulgated and espoused by the City with respect to the conduct of its parks" (Petition, p. 50). First, of course, it was Bacon, and not the City of Macon, who promulgated these provisions and, second, the provisions of Bacon's will had nothing whatever to do with the conduct of the City of Macon's parks. They affected only Baconsfield, and the management of Bacon's park was vested, not in the City, but in the Board of Managers whose sole responsibility was the management of the park in accordance with Bacon's will.

The contention that Bacon intended for the provisions of his will to "achieve very quickly the status of City

Ordinances" (Petition, p. 51) is not only without foundation, it is pure fantasy. There is not the slightest indication in the will that Bacon had any such intention. Furthermore, had Bacon intended to involve the City to such an extent (and under Georgia law, we know of no way for him to have elevated his will to the status of a City Ordinance) it hardly seems likely that he would have provided for the park to be managed by the Board of Managers rather than by the City.

Petitioners also argue that Bacon's will "rested" upon Georgia Code Section 69-504, and since this statute has always been unconstitutional (so petitioners erroneously contend) those provisions of Bacon's will which provide for the racial restriction should simply be stricken. Assuming arguendo that 69-504 was in fact unconstitutional, its provisions could be (to use petitioners' word) "stricken" **only** because the statute was promulgated by the state legislature, and the 14th Amendment forbids State sponsored racial discrimination. Bacon's will, of course, was solely the product of Bacon, a private citizen, and no matter how discriminatory the provisions of his will might be, they cannot be treated in the same manner as a state statute, for the 14th Amendment does not reach private discrimination. While Bacon's plan can no longer be carried out, there is no law, state or Federal, which would authorize any court to "strike out" any part of the will, leaving those portions pleasing to petitioners to stand.

The Georgia Supreme Court considered the contention that Georgia Code Section 69-504 was unconstitutional, even at the time it was enacted, and correctly concluded that for it to "hold that the trust provision of Senator Bacon's will was made pursuant to an unconstitutional Code Section, would have the effect of making the trust impossible of performance (**Smith v. DuBose**, 78 Georgia 413, 434), and thus cause a reversion under Code Section

108-106 (4)" (Opinion of Georgia Supreme Court, Appendix to Petition, p. 22a).

We agree with the Georgia Supreme Court that whether or not Section 69-504 was, or was not, constitutional at the time of its enactment has no bearing on the issues in this case for the same result obtains in either event. Nevertheless, we would note in passing, and in defense of Section 69-504, that this statute was in fact constitutional "even under **Plessy v. Ferguson.**" Section 69-504 has absolutely nothing whatever to do with a city's park system and whether or not a system provided for "separate but equal" parks would obviously depend upon an examination of the particular park system under consideration. Furthermore, neither the State of Georgia nor the City of Macon has ever had a statute or ordinance requiring racial segregation in parks; therefore, the "separate but equal" doctrine could hardly be in issue.

It also should be noted that while Section 69-504 authorized a testator to provide for a park that would be racially segregated, it did not require that such a park necessarily be segregated **(Evans v. Newton,** 220 Ga. 280, 138 S. E. 2d 573 (1964); nor was there any reason under Georgia Law why Bacon's provision for a racially segregated park would not have been entirely valid even in the absence of Section 69-504. See **Strother v. Kennedy,** 218 Ga. 180, 127 S. E. 2d 19 (1962) and **Houston v. Hills Memorial Home,** 202 Georgia 540, 43 S. E. 2d 680 (1947).

The "philosophy" of **Marsh v. Alabama,** 326 U. S. 501 (1946), has no application to the case under consideration. The situation in the case at hand differs markedly from that which existed in **Marsh v. Alabama,** supra. The fundamental difference (and the only one necessary to comment upon) is that, with the failure of the trust, Bacon's property has been completely removed from the "public sphere"; and, therefore, there can be no question of anyone being denied any constitutional rights.

While **Marsh v. Alabama**, supra, might have been of possible relevance to the question of whether Bacon's property could continue to be used as a segregated park, it is of no significance whatever insofar as the state law question of trust failure is concerned.

Nor can petitioners find support in either **Commonwealth of Pennsylvania v. Brown**, 392 F. 2d 120 (3rd Cir. 1968), cert. den. 391 U. S. 921 (1968) or **Sweet Briar Institute v. Button**, 280 F. Supp. 312 (W. D. Va. 1967) rev'd per curiam, 387 U. S. 423, decision on the merits, 280 F. Supp. 312 (1967), for in neither of these cases was trust failure (and reversion) in issue. The decision of the Georgia Court is completely consistent with these decisions, for it was expressly recognized that the racial restriction could not be enforced.

We do not share petitioners surprise that the Georgia Supreme Court did not deem it necessary to discuss petitioners contentions with respect to dedication (Petition, p. 55). That there had been no dedication to the public was so obvious as not to require elaboration. The very words of the will clearly negate any intention on Bacon's part to "dedicate" his property to the use of the general public. On the contrary, Bacon was specific in limiting the use of his property to a particular segment of the community.

Dedication is by definition a matter of property law, and whether or not a tract of Georgia property has been dedicated to the general public is very fundamentally a consideration controlled by Georgia law. The federal law command, as expressed in this Court's decision in **Evans v. Newton**, 382 U. S. 296 (1966), is only that if Bacon's property were to be continued to be used for a park, it would have to open to members of both races. This, we submit, has nothing whatever to do with the state law question of whether or not, **when Bacon executed his**

will, he "dedicated" his property to the use of the general public.

In summary, under no theory could any provision of Bacon's will have been treated as a nullity for it was the obligation of the Georgia court to construe the will as a whole, and to consider all parts and provisions thereof, including those provisions which limited the use of the property.

CONCLUSIONS.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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